

JRT-2011-CCG-0002

RODRÍGUEZ MARXUACH, P.S.C.

P.O.Box 16636 SAN JUAN
PUERTO RICO 00908-6636

HATO REY CENTER, SUITE 524
PONCE DE LEÓN 268
SAN JUAN, PUERTO RICO 00918

TEL. (787) 754-9898
FAX (787) 754-9897

September 27, 2011

Sandra E. Torres López, Esq.
Puerto Rico Telecommunications
Regulatory Board
500 Ave. Roberto H. Todd
San Juan, Puerto Rico 00907-3941

DE LA SECRETARIA
201 SEP 27 PM 3:36

Re: AT&T/T-Mobile Proposed Merger

SprintCom, Inc. and Sprint Communications Company, L.P. ("Sprint") applaud the JRT and individual Commissioners for clearly articulating in formal comments to the Federal Communications Commission ("FCC")¹ and in the press the harmful effects the merger of AT&T and T-Mobile would have on the wireless market in Puerto Rico. The JRT and Commissioners are quite right to be concerned. As the JRT has already expressed in no uncertain terms, if AT&T combines with T-Mobile, consumers of wireless services in Puerto Rico will be harmed. Indeed, if approved, the merger would harm consumers and competition throughout the United States.

Recognizing the harms inherent in the proposed merger, the United States Department of Justice ("DOJ") filed a Complaint in the U.S. District Court for the District of Columbia on August 31, 2011, seeking to permanently enjoin the merger ("DOJ Complaint").² In the *DOJ Complaint*, the DOJ stated that "unless

¹ Comments of the Telecommunications Regulatory Board of Puerto Rico, WT Docket No. 11-65 (August 4, 2011; filed August 5, 2011) ("JRT FCC Comments").

² *United States v. AT&T Inc., T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-01560, Complaint (D.D.C. filed Aug. 31, 2011) ("DOJ Complaint"). The DOJ filed an Amended Complaint on September 16, 2011, adding as additional plaintiffs through their respective attorneys general the states of New York, Washington, California, Illinois, Massachusetts, Ohio, and Pennsylvania. *United States, State of New York, State of Washington, State of California, State of Illinois, Commonwealth of Massachusetts, State of Ohio, and Commonwealth of Pennsylvania v. AT&T Inc., T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-01560, Amended Complaint (D.D.C. filed Sept. 16, 2011) ("DOJ Amended Complaint").

this acquisition is enjoined, customers of mobile wireless telecommunications services likely will face higher prices, less product variety and innovation, and poorer quality services due to reduced incentives to invest than would exist absent the merger."³ On September 6, 2011, Sprint filed its own Complaint asking the U.S. District Court for the District of Columbia to enjoin the merger ("*Sprint Complaint*").⁴ I am enclosing copies of the *DOJ Amended Complaint*, and the *Sprint Complaint* for your reference.

In its comments to the FCC, the JRT urged the FCC to "carefully scrutinize the proposed transaction to mitigate its impacts."⁵ The JRT further urged the FCC and DOJ to "perform a thorough, market-specific review of the effect of the proposed merger on competition in Puerto Rico; and, if necessary, to order conditions."⁶ For reasons set forth herein, Sprint respectfully requests that the JRT:

- Revise its FCC comments to urge the Commission to block the proposed transaction; and
- Work with the Puerto Rico Department of Justice, Anti-Monopolistic Practices Division, to draft and file a related antitrust action in the U.S. District Court for the District of Columbia or timely join the DOJ's complaint as an additional party.

The Proposed Merger Is "Unfixable" and Must Be Blocked

While it is sometimes the case that merger harms can be mitigated by conditions, in this particular instance **no remedies** - short of blocking the transaction - will preserve competition and protect the public interest. Local divestitures of spectrum or business units and behavioral conditions would be ineffective against the takeover's widespread competitive and public

³ *DOJ Complaint* at 3.

⁴ *Sprint Nextel Corporation v. AT&T Inc., AT&T Mobility LLC, T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-01600 (D.D.C. filed Sept. 6, 2011) ("*Sprint Complaint*"). Also, on September 19, 2011, Cellular South filed a related antitrust action in the same federal district court seeking to block the proposed transaction for violation of the federal antitrust laws. *Cellular South, Inc. and Corr Wireless Communications, L.L.C. v. AT&T Inc., AT&T Mobility LLC, T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-01690 (D.D.C. filed Sept. 19, 2011).

⁵ JRT FCC Comments at 1.

⁶ *Id.* at 5.

interest harms. As described below, T-Mobile is a strong national competitor to AT&T and an innovator benefitting consumers in several critical respects. Conditions and local divestitures simply cannot create a new competitor with the qualities necessary to replace T-Mobile as a check on AT&T's and Verizon's market power - e.g., a nationwide, facilities-based network; the ability to offer cutting-edge handsets and other devices; aggressive pricing and marketing of wireless plans; and a strong national brand. Exchanging the current competitive marketplace for a far less competitive market that relies on merger conditions to replicate real competition would be a very bad trade - bad for regulators, bad for competitors and bad for consumers.

As noted by the DOJ, AT&T's acquisition of T-Mobile will, if allowed, have nationwide anti-competitive effects across local markets.⁷ AT&T has acknowledged that it develops its "rate plans, features and prices in response to competitive conditions and offerings at the national levels - primarily the plans offered by the other national carriers" and that "the predominant forces driving competition among wireless carriers operate at the national level."⁸ In addition, as the DOJ has explained, enterprise and government customers require services that are national in scope,⁹ making the national market critical to those customers. Because competition occurs at a national level, it makes sense to consider the effects of the transaction at a national level,¹⁰ even if local markets are also taken into account. The loss of a value-oriented, innovative competitor and other harms to consumers in Puerto Rico and nationally that would result from the merger cannot be corrected with conditions or divestitures that would break T-Mobile into pieces.

1. Anticompetitive Effects

The proposed transaction would harm all segments of the wireless marketplace. Consumers in Puerto Rico and across the United States would face fewer choices for effective national service from providers offering full access to broadband data services and cutting edge handsets. T-Mobile has positioned

⁷ DOJ Complaint at 8.

⁸ Id. at 10.

⁹ Id. at 7.

¹⁰ Id. at 9-11.

itself as a strong value option for wireless services and focuses on aggressive pricing, value leadership and innovation. As stated by the DOJ: "T-Mobile customers benefit from the lower prices offered by T-Mobile, while subscribers of Verizon, AT&T, and Sprint gain from more attractive offerings that those firms are spurred to provide because of the attractive national value proposition of T-Mobile."¹¹ Moreover, T-Mobile's competitive importance is not limited to its low pricing. T-Mobile has also been an important innovator in the handset market, network development, and other areas.¹² Thus, an independent T-Mobile puts direct competitive pressure on AT&T in a number of areas, spurring innovation while also keeping prices low.¹³ Not only would consumers suffer from the loss of T-Mobile as an independent competitor to AT&T, but business customers would also suffer increased prices and reduced innovation as a key competitor for corporate accounts is eliminated. The harm might be even more pronounced in Puerto Rico, where Sprint would be left as the only national competitor still operating on the island that is not affiliated with America Movil. If the merger were consummated, it would increase the incentive and the ability of Sprint's rivals to damage competition on the island. Clearly, the unavoidable result of the transaction would be a substantial reduction of competition throughout the wireless industry which would injure consumers and businesses alike, including Sprint and other industry participants.

2. Conditions Cannot Remedy this Transaction

There is no set of conditions that can replace a national competitor like T-Mobile, which has played such an innovative role in the national wireless marketplace with respect to handsets, pricing plans, and the use of alternative technologies, such as Wi-Fi. Vibrant and effective competition encourages innovation, and the loss of a competitor would dampen innovation. Thus, it would be very difficult, if not impossible, to develop and enforce an effective regulatory regime that could successfully protect consumers from the anti-competitive effects of AT&T's proposed takeover of T-Mobile. In addition to the direct harms to consumers, the combination of AT&T and T-Mobile

¹¹ *Id.* at 13.

¹² *Id.*

¹³ *Id.*

would also harm competitors such as Sprint, by further limiting independent providers' ability to obtain access to cutting-edge handsets and to reasonably-priced backhaul and roaming services. Sprint and other smaller competitors around the country would suffer direct anti-competitive harms. And these harms would be practically impossible to control via merger conditions. Indeed, the harms are so numerous and so multi-faceted that it is simply unrealistic to think they can be prevented by practical, enforceable merger conditions.

Moreover, AT&T has a track record of resisting compliance with merger conditions, and there is no reason to believe that applying mitigation measures in this instance would result in fewer enforcement concerns.¹⁴ Rather than lobbying for merger conditions that cannot mitigate the merger's anti-competitive effects, it would be far better for the JRT to protect wireless competition by urging the FCC to block the proposed merger and by drafting and filing a related antitrust action in the U.S. District Court for the District of Columbia or timely joining the DOJ's complaint as an additional party seeking to enjoin the merger.

Conclusion

Recognizing the harms the proposed merger poses to the Puerto Rico market, the JRT has already taken a strong stand against AT&T's attempted takeover of T-Mobile. Sprint urges the JRT to take stronger action and oppose the merger outright to avoid the harms the merger inevitably would inflict on consumers in wireless marketplace. The JRT should:

¹⁴ See, e.g., *AT&T Inc., Parent Company of Licensees of Various Authorizations in the Cellular Radiotelephone and Other Wireless Services*, Order, 24 FCC Rcd 126 (2009), regarding an investigation opened by the FCC and DOJ after receiving information that AT&T employees may have accessed and used confidential and competitively-sensitive sales files in violation of conditions attached to AT&T's acquisition of Dobson Communications. As part of the Consent Decree adopted to terminate the investigation, AT&T agreed to make a Voluntary Contribution to the Treasury in the amount of \$2,380,000. *Id.* at Appendix, Consent Decree, ¶ 16. See also *SBC Communications, Inc.; Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, ¶ 1 (2002), in which the FCC imposed a forfeiture of \$6,000,000 against SBC Communications, Inc. for willfully and repeatedly violating one of the conditions of the SBC/Ameritech merger by failing to offer shared transport pursuant to agreed-upon terms and conditions.

- Urge the FCC to block the proposed transaction; and
- Work with the Puerto Rico Department of Justice, Anti-Monopolistic Practices Division, to draft and file a related antitrust action in the U.S. District Court for the District of Columbia or timely join the DOJ's complaint as an additional party.

Cordially,



Miguel J. Rodríguez Marxuach
RODRÍGUEZ MARXUACH, PSC
Attorneys for SprintCom, Inc. and
Sprint Communications Company L.P.

Encs.

cc: Vicente Aguirre Iturrino, Esq., Telecommunications
Regulatory Board
Eng. Nixyvette Santini Hernández, Telecommunications
Regulatory Board
Hon. Guillermo Somoza Colombani, Secretary of Justice
José Díaz Tejera, Esq., Department of Justice, Office of
Monopolistic Affairs